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No. 89-7671

Supreme Court, U.S.  
**FILED**

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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1989

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MICHAEL WAYNE HUNTER, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF CALIFORNIA**

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**RESPONSE IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Whether a capital defendant may compel a trial court to grant immunity to a defense witness under the Fifth, Sixth, Eighth or Fourteenth Amendments.

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**OPINION BELOW**

The opinion by the California Supreme Court is reported at 49 Cal.3d 957,  
782 P.2d 608, 264 Cal.Rptr. 367 (1989), mod. 50 Cal.3d 133a (1990).

**JURISDICTION**

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

### STATEMENT OF THE CASE

On February 9, 1984, a jury found petitioner Michael Wayne Hunter guilty of two counts of first degree murder with multiple-murder special circumstances. Cal. Pen. Code §§ 187, 190.2(a)(3). C.T. 164-66, 382.<sup>1/</sup> After a penalty trial, the jury returned a verdict of death. C.T. 390, 479. On March 23, 1984, the trial court denied petitioner's automatic motion to reduce the penalty, Cal. Pen. Code § 190.4(e), and sentenced petitioner to death. C.T. 496-99. On December 7, 1989, the California Supreme Court affirmed petitioner's judgment upon his automatic appeal. Cal. Pen. Code § 1239(b). On February 1, 1990, that court modified its opinion without affecting the result, and denied petitioner's application for rehearing. *People v. Hunter*, 49 Cal.3d 957, 782 P.2d 608, 264 Cal.Rptr. 367, mod. 50 Cal.3d 133a.

### STATEMENT OF FACTS

On the evening of December 28, 1981, petitioner, who was then 23 years old, shot to death his father and stepmother, Jay and Ruth Hunter, in the bedroom of their home. He killed his father with four shotgun blasts, and his stepmother with two. About a month before, petitioner told his friend, Thomas Henkemeyer, he intended to commit the killings. Petitioner expressed a number of grievances against his parents; he believed he was being cheated out of his inheritance from his natural mother, whose will

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1. "C.T." refers to the clerk's transcript on appeal to the California Supreme Court. "R.T." refers to the reporter's transcript of proceedings.

was being handled by his stepmother; and he resented that his stepmother had reported him to the police for breaking into their house while she and Jay Hunter were away on vacation. In mid-December petitioner brought a shotgun to Henkemeyer's residence and said he planned to use it to kill his parents. Henkemeyer went to Minnesota to visit family over the holidays, leaving the keys to his car and apartment with petitioner. Petitioner called Henkemeyer twice in Minnesota and admitted the killings. He said he had spoken to a lawyer and was planning to leave the country.

Petitioner told another friend, Jefferson Schar, about the murders. He told Schar that an unidentified gunman actually did the shooting at his direction. He said he told the gunman to shoot his father when his father said, "You don't have the balls enough to do anything. . . ." When his stepmother said, "No, Mike, don't," the gunman shot her too. Petitioner fled to Mexico with Schar's help.

Once in Mexico petitioner contacted another friend, Jeffrey Luther, who lived in San Diego. They met at a restaurant located in the United States near the border, and petitioner told Luther he had shot his parents. Luther later agreed to purchase some items for petitioner, but informed the police in the meantime. When Luther and petitioner again met at the restaurant, the police were waiting and arrested petitioner.

Physical evidence also connected petitioner to the murders. A search of his home and vehicles turned up a shirt with blood on it, glass fragments that matched glass from the window petitioner broke to enter his parents' residence, and a cleaning bill for a jacket with the notation "pre-spot for blood." The police also found a black motorcycle helmet in petitioner's home. A neighbor who had been walking his dogs near the Hunter

home on the night of the murders had been confronted and shot at by a young man wearing such a helmet. Petitioner explained to his friend Henkemeyer that this encounter had occurred as he was leaving his parents' residence. He did not think the man could identify him because he had been wearing the helmet.

The defense did not contest that petitioner killed his parents, but attempted to show that the killings were without malice and were not premeditated due to petitioner's intense hatred for his father caused by his father's abuse of him. Four former neighbors and family friends testified that Jay Hunter verbally and physically abused petitioner during his youth. Petitioner's younger brother Tom also testified that Jay Hunter had often hit petitioner, but his sister Mary said she had never witnessed any beatings. Mary Hunter also related that petitioner told her on the day after the murders, that he was depressed because of a funeral he had attended for a friend's mother. A psychiatrist testified that petitioner was clinically depressed on the day of the shootings and that it was unlikely he had premeditated the killings.

The prosecution presented no additional evidence at the penalty phase. The defense presented additional testimony from petitioner's brother Tom, who asked the jury to spare petitioner's life to prevent additional suffering by the family. The court also permitted petitioner to give an unsworn statement in allocution not subject to cross-examination. Petitioner recounted his life and achievements and described his deteriorating relationship with his father. He mentioned the funeral he had attended on the day of the murders and said this made him think of his natural mother's death from cancer. He began to feel it was unfair that his father was still alive. He admitted

responsibility for the killings, although he said he could not remember his stepmother being in the room. He told the jury he thought he could still contribute to society, especially with the help of counselling. *People v. Hunter*, 49 Cal.3d at 964-70, 974, 782 P.2d at 610-14, 617, 264 Cal.Rptr. at 369-73, 376.

## ARGUMENT

### **A CRIMINAL DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO OBTAIN JUDICIALLY CONFERRED USE IMMUNITY FOR A DEFENSE WITNESS WHO PROPERLY INVOKES THE PRIVILEGE AGAINST SELF-INCRIMINATION.**

Petitioner asks this court to grant a writ of certiorari to decide whether the Fifth, Sixth, Eighth, and Fourteenth Amendments authorize and compel state trial judges to grant testimonial use immunity to defense witnesses upon an adequate showing of need. The great majority of courts to consider this issue agree that the decision to grant immunity is a prosecutorial, not judicial function. In any event, this is a particularly inappropriate case to decide the issue since petitioner's showing of need failed to satisfy the standard of the one federal circuit that approves of judicial immunity.

#### **A. Procedural Background**

The district attorney charged appellant's girlfriend, Judith Goldstein, with being an accessory to the murders. At the request of her attorney, Ms. Goldstein's case was continued until the conclusion of petitioner's trial.<sup>2/</sup> Petitioner called her to testify in his defense, but she refused to answer any questions, invoking her privilege against self-

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2. Ms. Goldstein's attorney stated, "Her case has been continued on various occasions because I determined, apparently with the concurrence of the District Attorney that it was appropriate to have her case proceed to trial after Mr. Hunter's matter was resolved." R.T. 5738. The full extent of Ms. Goldstein's culpability was not revealed at petitioner's trial. The record of petitioner's trial does show that she supplied an address where petitioner could receive a phony birth certificate after the murders, and that she took possession of some of petitioner's personal property. R.T. 4773-75, 5019-20.

incrimination. Defense counsel asked the court to grant use immunity to Ms. Goldstein. The trial judge asked for an offer of proof of the anticipated content of her testimony. Counsel explained that Ms. Goldstein would testify about a statement petitioner made at a funeral he attended on the day of the murders:

"It is my understanding that during the course of that [funeral] ceremony . . . [petitioner] made the statement to Judith Goldstein -- or a question, possibly -- 'why is it the good people die and the bad still live.' [¶] I submit, Your Honor, that it is material to the question of mental state of the defendant on the 28th day of December of 1981."

The trial court denied the defense request for immunity. *People v. Hunter*, 49 Cal.3d at 972-73, 782 P.2d at 616, 264 Cal.Rptr. at 374-75. Defense counsel renewed his request for immunity for Ms. Goldstein at the penalty phase, stating she might offer "evidence in mitigation." Counsel made no additional offer of proof of her expected testimony. The trial court again denied the request. 49 Cal.3d at 980-81, 782 P.2d at 621, 264 Cal.Rptr. at 380.

#### **B. Neither The Compulsory Process Nor Due Process Clause Empower Courts To Grant Immunity**

Petitioner argues that the compulsory process clause of the Sixth Amendment and due process clause of the Fifth and Fourteenth Amendments entitled him to compel a judicial grant of immunity for Ms. Goldstein so that her testimony could be secured despite her exercise of her privilege against self-incrimination.

This Court has stated, "No court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one. . . ." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 260 (1983) (holding that "a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony . . ., and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege"); *see also*, *United States v. Doe*, 465 U.S. 605, 616-17 (1984); *but see*, *Autry v. McKaskle*, 465 U.S. 1085, 1087-88 & n. 3 (1984) (Marshall, J., dissenting from denial of certiorari). Both *Pillsbury Co. v. Conboy* and *United States v. Doe* concerned application of the federal immunity statute, 18 U.S.C. §§ 6002 and 6003. In those decisions the Court observed:

"[I]n passing the use immunity statute, 'Congress gave certain officials in the Department of Justice exclusive authority to grant immunity.' 'Congress foresaw the courts as playing only a minor role in the immunizing process. . . .' The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation."

*United States v. Doe*, 465 U.S. at 616 (quoting *Pillsbury Co. v. Conboy*, 459 U.S. at 253-54 & 254 n. 11).

California's Legislature has similarly enacted an immunity statute, California Penal Code section 1324,<sup>3/</sup> that assigns the decision to seek immunity exclusively to the prosecuting attorney. An important difference between the state and federal statutes is that the state law permits only transactional immunity from all prosecution for crimes revealed in the witness' compelled testimony, and not the more limited use immunity permitted under federal law. Like under federal law, however, the California statute grants the court no authority to independently immunize a witness. *People v. Hunter*, 49 Cal.3d at 973, 786 P.2d at 616, 264 Cal.Rptr. at 375 ("It is settled in California that the granting of testimonial immunity is conditioned upon a written request by the prosecutor that the witness be compelled to answer.").

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3. California Penal Code § 1324 provides:

"In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order."

Petitioner nevertheless asserts that courts have inherent power to grant use immunity in order to vindicate a criminal defendant's Sixth Amendment right to compulsory process and Fifth and Fourteenth Amendment right to due process.

Petitioner cites no case which holds that judicial power to grant immunity inheres in the Sixth Amendment. In *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), the Court of Appeals for the Second Circuit decisively rejected that argument.

"The established content of the Sixth Amendment does not support a claim for defense witness immunity. Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's nonprivileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. While the prosecutor may not prevent or discourage a defense witness from testifying, it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity."

*Id.* at 773-74, citation omitted.

One federal circuit court has held that judicial immunity may be ordered to vindicate a defendant's due process right to present exculpatory evidence. *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3rd Cir. 1980). The court stated that judicial immunity was not "a new or unique constitutional right, but rather . . . a new remedy to

protect an established right." *Id.* at 971. The court went on to explain the scope of its new remedy:

"[B]efore a court can grant immunity to a defense witness, it must be clear that an application has been made to the district court naming the proposed witness and specifying the particulars of the witness' testimony. In addition, the witness must be available and the defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses. Once the court determines that the defendant has satisfied this threshold burden, the focus then shifts to consideration of the state's countervailing interests, if any."

*Id.* at 972-73, footnote omitted.<sup>4/</sup>

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4. The *Smith* court alternatively held that the government could be forced to grant immunity or face a judgment of acquittal when, through misconduct, the government deliberately distorts the factfinding process. 615 F.2d at 974. In *Smith*, the United States Attorney refused to consent to a grant of immunity though the local prosecutor, the Virgin Island's Attorney General, had agreed to grant immunity to the defense witness. *Id.* We have no doubt that in an appropriate case dismissal may be ordered for deliberate government misconduct intended to distort the factfinding process. In some circumstances, the prosecutor may prefer to grant immunity to a witness rather than suffer a dismissal where such misconduct has been shown. Petitioner suggests that the trial prosecutor below engaged in "intentional interference with petitioner's constitutional right to present . . . evidence" by not objecting to Ms. Goldstein's request to continue her case until petitioner's concluded. Petition at 19. This did not constitute misconduct. One defendant's case had to be tried first. It was far more sensible to try petitioner's case before Ms. Goldstein's. Had petitioner been acquitted, the prosecutor would have had little incentive to proceed against Ms. Goldstein. Thus, the state supreme court found, "[T]here is no evidence here that the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory testimony." *People v. Hunter*, 49 Cal.3d at 975, 782 P.2d at 617,

Every other federal circuit court to consider the question has rejected the Third Circuit's *Smith* holding as being a violation of the doctrine of separation of powers. See e.g., *United States v. Capozzi*, 883 F.2d 608, 614 (8th Cir. 1989); *Mattheson v. King*, 751 F.2d 1432 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138; *United States v. Pennell*, 737 F.2d 521, 526-28 (6th Cir. 1984), *cert. denied*, 469 U.S. 158; *United States v. Gottesman*, 724 F.2d 1516, 1523-24 (11th Cir. 1984); *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States v. Heldt*, 668 F.2d 1238, 1282-83 (D.C. Cir. 1984), *cert. denied*, 456 U.S. 926; *United States v. Thevis*, 665 F.2d 616, 638-41 (5th Cir. 1982), *cert. denied*, 459 U.S. 825; see also, *United States v. Davis*, 623 F.2d 188, 192-93 (1st Cir. 1980); *United States v. Klauber*, 611 F.2d 512, 517 (4th Cir. 1979), *cert. denied*, 446 U.S. 908; *United States v. Smith*, 542 F.2d 711, 715 (7th Cir. 1976); *United States v. Alessio*, 528 F.2d 1079, 1080-82 (9th Cir. 1976), *cert. denied*, 426 U.S. 948.

Undeniably, a defendant has a right to obtain truthful exculpatory evidence possessed by the prosecutor. See, *Brady v. Maryland*, 373 U.S. 83, 87 (1963). But this does not mean the prosecution must assist the defendant by extracting from others evidence it does not have through a grant of immunity. As explained by the Second Circuit,

"The concept of a trial as a search for the truth has always failed of full realization whenever important facts are shielded from disclosure because of a lawful privilege. The key fact needed to prove a defendant's innocence

may be contained in a client's privileged admission to his attorney or a husband's privileged admission to his wife, as well as in the testimony of a witness protected by the privilege against self-incrimination."

*United States v. Turkish*, 623 F.2d at 775.

Judicial immunity poses a serious threat to the prosecutorial crime-charging function. The state has a "heavy burden" of proving that its case against a witness has not been assisted by the witness' prior immunized testimony. *Kastigar v. United States*, 406 U.S. 441, 461 (1972). "[A]wareness of the obstacles to successful prosecution of an immunized witness may force the prosecution to curtail its cross-examination of the witness in the case on trial to narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution." *United States v. Turkish*, 623 F.2d at 775. In addition, "defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators." *Id.*

These concerns "are matters normally better assessed by prosecutors than by judges." *Id.* at 776.

"An immunity decision . . . would require a trial judge, in order to properly assess the possible harm to public interests of an immunity grant, to examine pretrial all the facts and circumstances surrounding the government's investigation of the case. Such collateral inquiries would necessitate a significant expenditure of judicial energy, possibly to the detriment of the

judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial."

*United States v. Thevis*, 665 F.2d at 640.

We think that the conclusion of the Second Circuit in *Turkish* correctly states the law:

"Without precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it. The essential fairness required by the Fifth Amendment guards the defendant against overreaching by the prosecutor, and insulates him against prejudice. It does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges."

*Turkish* at 777. Accordingly, the Second Circuit flatly precludes judicial immunity for a defense witness "whenever the witness for whom immunity is sought is an actual or potential target of prosecution." *Id.* at 778. Under this near-unanimous view, petitioner was not entitled to obtain immunity for Ms. Goldstein.

C. Petitioner Failed To Meet The Requirements Of *Government of Virgin Islands v. Smith*

Even if a sound argument could be made that the power to grant judicial immunity inheres in the Constitution to override a valid claim of privilege, this would be a particularly inappropriate case to decide the issue. Under the Third Circuit's standard,

immunity may be granted only if the proffered testimony is unambiguous, clearly exculpatory and not cumulative. *Government of Virgin Islands v. Smith*, 615 F.2d at 972. The California Supreme Court found it unnecessary to decide whether judicially conferred use immunity could ever be ordered for the very reason that petitioner's "offer of proof at trial in support of his request fell well short of the standards set forth in the one case which has clearly recognized such a right. . . ." *People v. Hunter*, 49 Cal.3d at 973-74, 782 P.2d at 616, 264 Cal.Rptr. at 375. The state court observed:

"As noted above, defense counsel's offer of proof was that Ms. Goldstein would testify defendant was depressed as a result of attending a funeral, and that he had made the statement, 'Why is it the good people die and the bad still live.' Even assuming that the proffered testimony was not inadmissible hearsay, it did not meet *Smith's* requirement that the evidence be 'clearly exculpatory and essential.' At best, the evidence was cumulative of the extensive testimony of other defense witnesses. It was well established that defendant had been abused by his father. Furthermore, defendant's sister testified that she spoke with defendant the day after the murder, and recalled that defendant stated he was feeling depressed from having attended a funeral the previous day. In addition, Dr. Lunde, a psychiatrist, offered his expert opinion that defendant was clinically depressed on the day of the murder and could not, as a result, have committed a willful, deliberate and premeditated murder. In short, defendant failed to

demonstrate that the proffered testimony was 'clearly exculpatory and essential' to his defense."

*Id.* at 974, 782 P.2d at 617, 264 Cal.Rptr. at 376.

Petitioner disputes the state court's findings. Petition at 15-16. The state supreme court had before it the entire trial record. Its factual conclusions are fairly supported by that record. Certiorari should not be granted for the purpose of reassessing whether petitioner made an adequate offer of proof under the *Smith* standard. *See, United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

D. The Power To Grant Judicial Use Immunity Does Not Inhere In The Eighth Amendment

Finally, petitioner argues that the trial court's failure to grant immunity at the penalty phase deprived him of his Eighth Amendment right to present all relevant mitigating evidence on the question of appropriate punishment. *See, Lockett v. Ohio*, 483 U.S. 586 (1976).

The state did not deprive petitioner of any relevant mitigating evidence. The decision not to testify was Ms. Goldstein's and hers alone. As the Second Circuit said of the Sixth Amendment right to compulsory process, it is difficult to see how the Eighth Amendment of its own force places upon either the prosecutor or the trial court an affirmative obligation to secure testimony from a defense witness by replacing the

protection of the self-incrimination privilege with a grant of immunity. *See, United States v. Turkish*, 623 F.2d at 773-74.

Moreover, the state supreme court concluded that the record simply did not show petitioner was deprived of relevant mitigating evidence.

"Even assuming, without purporting to decide, that the trial court had the authority to confer use immunity on the proposed witness, we cannot conclude on this record that the court erred. There is nothing in the record to demonstrate defendant was denied highly relevant mitigating evidence, or to reveal the nature of that evidence. Even assuming that the evidence would have generally related to defendant's state of mind on the morning of the murder, we cannot find that the absence of Ms. Goldstein's testimony prejudiced defendant. The jury had already been presented evidence of defendant's purported depression at the guilt phase through the testimony of two psychiatrists. Moreover, defendant expressly indicated in his statement in allocution that his attendance at the funeral made him feel that 'it was unfair that [his] father was still alive.'"

*People v. Hunter*, 49 Cal.3d at 980-81, 782 P.2d at 621, 264 Cal.Rptr. at 380. Again, this Court does not grant certiorari to reassess the facts. *United States v. Johnson*, 286 U.S. at 227.

**CONCLUSION**

For the foregoing reasons, respondent submits that the petition for writ of certiorari should be denied.

DATED: July 13, 1990.

JOHN K. VAN DE KAMP, Attorney General  
of the State of California

RICHARD B. IGLEHART

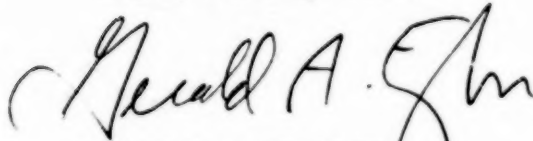
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A handwritten signature in black ink, appearing to read "Gerald A. Engler". The signature is fluid and cursive, with a large, sweeping "G" and "E".

GERALD A. ENGLER

Deputy Attorney General

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